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IN THE

Supreme Court of the United States

October Term, 1975

No. 75- 674

WHEELING-PITTSBURGH STEEL CORPORATION,
Petitioner

v.

THOMAS W. GRIFFITH and
AMERICAN COMMERCIAL LINES, INC.,
Respondents

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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INDEX

	PAGE
Table of Authorities	ii
Counter-Statement of Questions Presented	1
Counter-Statement of Case	2
Reasons for Denying the Writ	4
I. The decision in this case will have minimal impact upon judicial caseloads and will not be of importance to anyone other than the parties to this suit	4
II. The Court of Appeals' opinion is consistent with the language of the Act and with the clear legislative purpose to induce those in the possession and control of vessels to exercise great care toward longshoremen	6
Conclusion	13

TABLE OF AUTHORITIES

CASES	PAGE
Landon v. Lief Hough and Co., Inc., 521 F2d 756 (2d Cir. 1975)	9
North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975)	4
Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp., 350 U.S. 124 (1956)	7
Streatch v. Associated Container Transportation, Ltd., 388 F. Supp. 935 (C.D. Cal. 1975)	9

STATUTES	
Longshoremen's and Harbor Worker's Compensation Act:	
33 U.S.C. §902(21)	7
33 U.S.C. §905(b)	9
H. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972); 1972 U.S. Code Cong. and Adm. News, 4698 (1972)	10
S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972)	8, 9

LAW REVIEWS	
Gorman, The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments, 6 J. Mar. Law & Comm. 1 (1974)	12
Vickery, Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 41 Ins. Counsel J. 63 (1974)	10

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COUNTER STATEMENT OF QUESTIONS PRESENTED

1. Whether Wheeling-Pittsburgh Steel Corporation exercised sufficient possession and control over the barge on which Respondent was injured to become the owner *pro hac vice* of that barge.

2. Whether the Longshoremen's and Harbor Workers' Compensation Act insulates an entity serving in the dual capacity of vessel owner and stevedore-employer from tort responsibility for injuries to longshoremen caused by that entity's negligent exercise of its ownership duties?

COUNTER-STATEMENT OF THE CASE

On May 26, 1973, Respondent Thomas Griffith was thrown into the hold of a barge and seriously injured. The barge was owned by American Commercial Lines, Inc., and was in the exclusive possession of the Petitioner, Wheeling-Pittsburgh Steel Corporation.[1] The injury occurred because the rails upon which the barge covers rode were bent and, as a consequence, the covers did not roll freely but instead had to be forced closed with the use of cables attached to a crane.[2]

The pleadings, interrogatories and depositions of record in this case disclose that the barge had been delivered to Petitioner Wheeling-Pittsburgh Steel Corporation on May 23, 1973 and was in its exclusive possession from that date until May 28, 1973, when it was turned over to a tow-boat for delivery to another destination.[3] During the time the barge was in the exclusive possession of Wheeling-Pittsburgh Steel Corporation all movements of the barge from the upriver position to which it was first delivered, downriver to the dock where it was loaded with steel, and further downriver to the point where it was picked up by a tow-boat for delivery to its ultimate destination, were performed by Petitioner's personnel and pursuant to its direction. Moreover, Petitioner maintained a permanent river landing

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1. American Commercial Line's Answer to Complaint, Paragraph 4; and Petitioner's Answer to interrogatory No. 52 from American Commercial Lines, Inc.

2. Wheeling-Pittsburgh Steel Corporation's answers to interrogatories Nos. 11, 34, 38, 39 and 41 from American Commercial Lines, Inc.

3. Petitioner's Answers to Interrogatories Nos. 26 and 52 from American Commercial Lines, Inc.;

facility and a crew of rivermen to manuever and tend barges while in its possession. To accomplish these manuevers, Petitioner's employees use both a crane and a small landing boat.[4] The owner of the vessel gave no orders, either as to the making of any such moves nor as to the manner in which the moves or the loading of the barges should be accomplished.[5] In commenting upon the degree of control over the barge exercised by Petitioner during this period when it was in its exclusive possession, the Court of Appeals noted that "Wheeling concedes that it might be found to be an 'owner pro hac vice' as that term has been applied in this circuit." (App. A, p. 12a)

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4. Deposition of Franklin J. Merritt, p. 36-37; deposition of James Phillips, p. 8-9, 47; deposition of Roy Preston Locy, p. 3-6; deposition of Robert William Reidel, p. 19-20.

5. Indeed, the deposition of Franklin J. Merritt, maintenance supervisor for American Commercial Lines, Inc., indicates at p. 45-46 that the bargeowner could not even control Pittsburgh-Wheeling's improper, and physically damaging procedures used while its barges were in Pittsburgh-Wheeling's possession.

REASONS FOR DENYING THE WRIT

I. The Decision in This Case Will Have Minimal Impact Upon Judicial Caseloads and Will Not Be of Importance to Anyone Other Than the Parties to This Suit.

Petitioner's statements as to the importance and far-reaching impact of the issues raised by this case are as exaggerated as the reports Mark Twain had of his death.[1]

The statistics set forth in the Petition suggest the Court of Appeal's decision will enable every injured longshoreman or ship repairer to sue his employer. By implication he also suggests that this may increase the maritime caseload of the district courts some twelve-fold. However, the unambiguous language of the opinion itself gives clear evidence that no such onslaught of litigation could possibly occur.

First, the Court of Appeals made it eminently clear that only a longshoreman or ship-repairer employed directly by the vessel owner or one exercising sufficient possession and control of the vessel to qualify as an owner *pro hac vice* will be able to bring an action against his employer. Moreover, to be successful, that action must be premised upon the employer-owner's negligence in the fulfillment of its ownership function, and not in the fulfillment of its stevedoring or ship-repairing functions. As stated by the Court of Appeals:

> "The vessel, even a vessel which is an employer under the Act, is relieved of liability for negligence

1. See concurring opinion of Mr. Justice Stewart in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, at p. 608 (1975).

> of persons engaged in providing stevedoring services, but is not relieved of liability for its own 'owner' occasioned negligence." App. 19a.

Thus, far from dealing with the potential litigation of some 68,000 claims by injured longshoremen, we deal only with the fraction of those total longshoring injuries sustained by longshoremen employed by the owner of a vessel and injured as the result of negligence on the part of the employer-owner in fulfilling its "owner" duties, as opposed to its stevedoring or ship-repairing duties. Petitioner discreetly gives us no indication as to what fraction of the 68,000 total longshoring injuries he lists as occurring in 1971 fit within this rather tight shoe. Common sense indicates, however, that it is a minute fraction of the whole and that the decision in this case will have little impact on judicial caseloads.

Nor does there exist any other compelling basis for granting the Writ. There is no conflict of decisions in either the Courts of Appeal or the District Courts. Moreover, the posture of this case is such that the one issue of relevance to anyone other than the parties involved may never be reached. A large part of Petitioner's argument centers around whether the degree of control over the barge ceded to it by the barge's owner was sufficient to make it the owner *pro hac vice* of the vessel. That aspect of the case, which must of necessity turn upon its own facts and will affect few other litigants, must be disposed of before any consideration can be given to the broader problem of whether the amended Longshoremen's Act permits an employee to recover damages from his employer-owner for the latter's "owner" negligence.

The issues raised by this Petition are not nearly so significant as alleged by Petitioner. And, Petitioner itself advanced a threshold argument that, if accepted, would prevent this Court from reaching the only issue raised that could have more than incidental breadth. Petitioner received a full and complete hearing of his cause in both the District Court and the Court of Appeals. Its disappointment is not sufficiently important to justify an expenditure of this Court's very limited time.

II. The Court of Appeals' Opinion Is Consistent With the Language of the Act and With the Clear Legislative Purpose to Induce Those in the Possession and Control of Vessels to Exercise Great Care Toward Longshoremen.

Petitioner has argued that as a result of the Court of Appeals' decision, the liability of stevedore-employers within the scope of the Longshoremen's Act will be expanded rather than contracted. That statement, intended to suggest that the decision is contrary to the legislative purpose, is simply not true.

Prior to the 1972 Amendments, an injured longshoreman could sue the vessel owner on the theory of unseaworthiness to recover full damages for his injuries. If the unseaworthy condition was caused by the longshoreman's employer—as was frequently the case since most of these injuries occur during the process of loading or unloading the vessel—the owner could then recover back from the employer any damages it paid to the injured employee. Thus, before the effective date of the 1972 Amendments, an employer was often held fully responsible for tort damages awarded to its injured

employees even though the Longshoremen's Act provided that the employer's liability was limited to the payment of compensation benefits.

Both the amended Longshoremen's Act and the decision of the Third Circuit in this case make it clear that this broad liability can no longer inure to the employer's detriment. It is now clear that an employee within the scope of the Amended Act cannot recover for an injury caused by the unseaworthiness of the vessel—regardless of whether the unseaworthy condition was created by his stevedore-employer or the vessel owner—and that the only remedy other than compensation benefits available to an injured longshoreman is an action against the vessel owner[2] for the latter's negligence. Moreover, since the tort rights of injured employees are expressly limited to actions against shipowners *for their negligence,* those shipowners deemed responsible for the employee's injuries cannot seek indemnification from the stevedore-employer.

Thus, it seems clear that the legislative goal of limiting the damage exposure of the stevedore-employers has been effectively achieved and that they can no longer be made to indemnify vessel owners pursuant to this Court's decision in *Ryan Stevedoring Co. v. Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956). Far from expanding the liability of stevedore-employers to pay damages for injuries to their employees, the opinion of the Court of Appeals makes it clear that such employers can no longer be held directly or indirectly responsible *as*

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2. That the liability of an owner *pro hac vice* is, for purposes of the Longshoremen's Act, identical to the liability of a vessel owner is made clear by 33 U.S.C. § 902 (21).

employers for payment of anything but compensation benefits.

What Petitioner really complains of, then, is not that the liability exposure of the employers *as employers* has been expanded; but that the Court of Appeals did not construe the amended Longshoremen's Act as insulating the employers from liability when they put on the additional hat of a vessel owner and, *while acting in the capacity of an owner,* negligently injure a stevedore-employee. The Court's reluctance to insulate the employer-owner from its own negligence while functioning as an owner is consistent with both the language of the amended Act and the legislative purpose.

There is no doubt that a purpose of the amended Act was to cut down the damage exposure of stevedore-employers. However, the Congress also made it abundantly clear that it was concerned about the hazards of longshoring, and that a co-equal legislative objective was to make sure that those persons responsible for the safety of longshoremen take every feasible precaution to prevent their injury. It was partially to fulfill that legislative goal that compensation benefits were increased, since it was believed that the added benefits would provide an economic inducement to employers to exercise greater care. As stated in the Report of the Senate Committee on Labor and Public Welfare, after noting that longshoring has an injury frequency rate more than four times the average for manufacturing operations:

> "It is important to note that adequate workmen's compensation benefits are not only essential to meeting the needs of the injured employee and his family, but, *by assuring that the employer bears the cost of unsafe conditions, serve to strengthen the employer's incentive to provide the fullest measure of on-the-job safety.*" S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972), at p. 2.

But, the Committee Report makes it abundantly clear that a longshoreman's safety depends upon precautions being taken by both his stevedore-employer and those in possession and control of the vessels upon which the longshoremen must work. And, recognizing that the goal of reducing longshoring injuries depends upon owners as well as employers taking reasonable precautions, the Committee specifically rejected a contention that would have insulated the "owners" from liability, concluding:

> "Permitting actions against the vessel based on negligence will meet the objective of encouraging safety because the vessel will still be required to exercise the same care as a land-based person in providing a safe place to work. Thus, nothing in this bill is intended to derogate from the vessel's responsibility to take appropriate corrective action where it knows or should have known about a dangerous condition." S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972), at p. 10.

Thus, the legislative goal of improving the safety conditions under which longshoremen must labor can only be effectively achieved if both stevedore-employers and those in possession and control of the vessels upon which the longshoremen must labor exercise due diligence in the performance of their respective, and quite different functions. And it was clearly believed by the Congress that such joint precautions could best be achieved with the concurrent negative inducements of higher benefits

payable by the employer and tort liability chargeable to the owner.[3]

The foregoing legislative considerations, and the resultant liability of owners for longshoring injuries caused by their negligence, applies equally to situations where a single entity is both owner and employer. There is no indication that the Congress expressed any less

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3. See also H. R. Rep. No. 92-1441, 92d Cong. 2d Sess., U.S. Code Cong. and Admin. News., p. 4704 (1972); *Streatch v. Associated Container Transportation, Ltd.*, 388 F. Supp. 935, at p. 939 (C.D. Cal. 1975); and Vickery, Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 41 Ins. Counsel J. 63, at 66 (1974). All of the above authorities support the conclusion that a purpose of the amended legislation was to induce vessel owners to exercise care in the fulfillment of their ownership functions.

And see *Landon v. Lief Hoegh and Co., Inc.*, 521 F2d 756 (2d Cir. 1975). There, in the course of holding that a longshoreman could sue the vessel owner even though his injuries were caused by the joint negligence of the vessel and his employer, the Court said:

> "First, the draftsmen of section 5(b), 33 U.S.C. §905(b), could easily have inserted the word 'sole' so that the clause would have read 'caused by the 'sole' negligence of the vessel.' Nothing has been called to our attention to indicate such intention. Second, Congress would hardly have given the ship so little incentive to avoid being negligent toward its longshoremen invitees." 521 F2d at 763.

Both points are applicable to the instant situation. Had Congress desired in §905(b) to distinguish between owners who are also employers and other owners, it could easily and unequivocally have accomplished that simple drafting task. But, to do so would have lessened the incentive of those employer-owners to exercise the desired high degree of care in fulfillment of their ownership functions, and would have been contrary to an important legislative goal.

concern for longshoremen injured as a result of the negligent operation of a vessel by an owner who is also an employer. In order to assure the maximum degree of safety attainable it is necessary that *both* the owner and the employer perform their respective duties in as safe a manner as is humanly possible. And, where one person—often through different divisions or with the use of different personnel—undertakes to perform both an employer and an owner function, it is no less important that he be induced to safely perform each of those disparate functions.

The amended Act expressly holds an "owner *pro hac vice*" responsible for damages it negligently inflicts upon longshoremen. Moreover, in so doing the Act specifically distinguishes between an owner *pro hac vice* and a "charter or bare boat charterer," notwithstanding that Congress must undoubtedly have been aware that the former category has been held to include those with far less incidents of ownership and control than usually is found in the latter, and that on the inland waterways of the nation an owner *pro hac vice* is one who usually functions both as the person temporarily in control of the navigational functioning of the vessel and as a stevedoring-employer. Petitioner urges that this was inadvertant. It seems far more plausible, and more in keeping with both the legislative concerns and the language of the amended Act, that this is the natural result of a desire to induce all who control the navigational mission of vessels, no matter for how short a time, to exercise great care toward those employed in the ultra-hazardous longshoring profession.[4]

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4. The conclusion reached by the Court of Appeals is consistent with the conclusion of other scholars who

have read the amended Act with awareness of the legislative concerns and goals. See Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments,* 6 J. Mar. Law & Comm. 1, at 16 (1974) where the author states:

> "The amendment seems to intend that, although unseaworthiness actions may not be maintained in the future, negligence actions may be maintained against the employer-vesselowner by a covered employee if the injury was not caused by the negligence of persons engaged in performing stevedoring or ship repair services. For example, an employer-vesselowner would still be liable in direct negligence suits by an employee-longshoreman if a member of the crew created a dangerous condition causing the injury."

CONCLUSION

There is no indication in either the language or legislative history of the amended Longshoremen's Act that vessel owners who serve in the dual capacity of stevedore-employers are to be treated differently than any other owners. If the goals of the legislators are to be fulfilled, both categories of owners must bear equal responsibility for the consequences of their negligence as owners. Congress did not, as Petitioner argues, write an Act making all owners equal, but providing that some owners are more equal than others.

Respectfully submitted,

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